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DISCUSSION RESPONSE

Towards an Integrated, Predictable and Coherent International Legal System: A Defence of Proportionality Balancing

JOHANN RUBEN LEISS — 10 August, 2015

A response to Sué González Hauck

Johann Ruben Leiss

In her post Sué González Hauck provides a thoughtful and critical perspective on proportionality balancing as a means to overcome fragmentation in international law. In my view, however, her perception overburdens proportionality

balancing with assumptions and expectations that do not reflect its character. I will first lay out the understanding of proportionality which this comment relies on, before then discussing the arguments brought forth by Sué González Hauck. In my conclusion I will provide a positive perspective on proportionally analysis and reflect upon the way in which proportionality can contribute to the defragmentation and harmonization of the international legal order.

Proportionality: Four Normative Decisions and Neutral Decision-making Procedure

The understanding of 'proportionality balancing' that underlies this comment builds up on the third prong of the *Verhältnismäßigkeitsprüfung* applied in German constitutional law – the so called proportionality in the narrow sense (*stricto sensu*). This implies that the process of balancing is not an isolated exercise but is part of a comprehensively structured scheme for the rationalization of legal arguments which can be commonly broken down into four prongs: the legitimate aim test, the 'suitability' test, the 'necessity' test, and the 'proportionality' test in the strict or narrow sense – the balancing.

Three main features characterize this test from a more theoretical point of view: the principle of proportionality includes four normative decisions on a rather high level of abstraction, beyond these normative decisions it is a mere neutral decision making procedure which sets a metric for the rationalization of *external* reasons.

As the first normative decision the requirement of a legitimate purpose implicates that certain legislative purposes are filtrated out. The suitability test encompasses

as the second normative decision that means that foster the ends are valued higher than means that do not. As the third decision the necessity test entails that less restrictive means are preferable than more restrictive means. Finally, the balancing stipulates that two colliding interests shall be put in context and both shall be accomplished to the greatest extent possible. It is important to emphasize that proportionality does not, however, determine more concrete normative decisions (Möller).

Once this basic normative framework is established the proportionality test becomes a neutral decision-making procedure – without fully predetermining any outcomes (Nolte). This neutral formal structure then sets the metric for the following *internal justification* (within the proportionality test) which is the inferential deduction of a result from premises that are *external* to the test (Klatt and Meister).

These *external premises* for example define standards for the evaluation of facts as the background for the suitability test and the necessity test (such as the burden of proof and the standard of proof) as well as the factors that are processed by the balancing (such as moral and political considerations).

On Fallacies: Deformalization of Legal Discourse?

Contrary to what Sué González Hauck argues proportionality balancing does not imply a normative decision to the effect that every right is to be turned into a principle and be made an object of weighting. Insofar proportionality cannot be taken and should not be understood as a 'pure principles model' (*reines*

Prinzipienmodell) – a fact that is also acknowledged by Alexy himself.

The character of a norm, whether it is a right or a trump, as well as its weight, is defined by *external reasons* that are to be found outside of the test. From this follows that balancing itself does not leave the legal form aside altogether. The proportionality test – including the balancing phase – is *per se* neutral with regard to the formal qualification of a norm. It is not inconsistent with the idea of 'absolute' rights or 'trumps'. Though of course, balancing that involves a 'trump' has a limited advantage: it merely serves as a method by which the primary value of the trump is clearly expressed within an argumentative structure – without simply denying or ignoring conflicting interests.

Even if one assumes that balancing fosters international judicial bodies to frame normative conflicts as conflicts of principles rather than conflicts of rules, the concerns expressed by Sué González Hauck, namely that his would go at the expense of the benefits of rules (such as transparency, predictability and equality) can be – at least partly – mitigated. It would go beyond the scope of this comment to engage in a thorough reflection on the relationship between the interpretation of rules and the interpretation of principles. It is here enough to highlight that also any process of rule- interpretation – taking complex hermeneutical implications into consideration – most likely (if not necessarily) involves balancing in a way that is not *per se* open. Hence it is – at least – very questionable whether any interpretation of a rule by its very nature promises a higher level of transparency and predictability.

Intransparency and Perpetuation of Structural Bias?

Any failure with regard to the assessment of the precise content of principles is not to be attributed to the balancing but to the *external justification* of the premise. The assessment of the content of a principle is first and foremost part of the determination of the premises that constitute the *external reasons* – not of the proportionality balancing.

As the balancing process requires clear premises, rather to the opposite of what Sué González Hauck suggests, it is likely to foster clarification of the content of the principles in question. Contextualizing the premises – as part of the balancing – is a process that is especially suited for revealing flaws in the determination of principle's content. Moreover, as pointed out above, the alternative – mere interpretation without open contextualization – is more likely to obscure underlying premises than the forthright process of balancing.

Furthermore, I would not subscribe to the proposition that balancing tends to negate the controversial nature of the conflicting principles in question, which goes hand in hand with the claim that proportionality pretends to be independent of moral reasoning and policy considerations (see the critique by Tsakyrakis). Proportionality rather discloses which components of the argument are made on the – narrow – normative premises *internal* to the proportionality analysis, and which are based on moral considerations and alike in the context of the determination of the *external* premises (Klatt and Meister).

Shifting the Burden of Justification?

Finally, I only agree partly with Sué González Hauck's last observation that proportionality balancing would lead to

shifting the burden of justification in international legal discourse.

It is true that if one exposes human rights to proportionality balancing this well might go at the expenses of human rights. In assessing this risk, however, one has to distinguish between instances in which human rights courts take into account non-human rights (Article 31 (3) (c) VCLT) and instances in which non-human rights judicial bodies take into account human rights. In the first case, the other relevant rules remain justifications for the limitation of human rights without shifting the burden of justification.

Only in the latter instance, human rights would be introduced as (potential) justifications for limitations of non-human rights. Yet, it is preferable – from a human rights law perspective – that those judicial bodies take human rights into account at all (even as a mere justification), rather than, what would be the realistic alternative, blatantly ignore human rights altogether.

And again, these considerations on the burden of justification are not predetermined by proportionality balancing. They are *external* reasons.

A Positive Concept of Balancing as a Device for Defragmentation and Harmonization

Against this background, how then does a positive concept of balancing as a device for defragmentation and harmonization look like?

The general benefit of proportionality analysis is that it helps courts to distinguish factual evaluation (necessity and suitability) from normative arguments (legitimate aim and

balancing *stricto sensu*). Understood as a mere neutral decision making procedure beyond the four basic normative decisions outlined above, it assists with identifying the premises and the context that underlie the legal argument, more than mere interpretation of rules and principles can provide for.

Understood as another 'relevant rule of international law' within the meaning of Article 31 (3) (c) VCLT – to be precise as a general principle of international law according to Article 38 (1) (c) of the ICJ-Statute – it offers an operational tool that makes the principle of systemic integration applicable as a helpful concept for overcoming defragmentation. It should be considered a complementary instrument for courts which determines how to take into account other rules of international law when applying Article 31 (3) (c) VCLT.

From a broader systemic perspective proportionality – if applied correctly – is likely to promote the creation of an integrated, predictable and coherent international legal system. It gives courts a tool at hand to give consideration to other norms of international law and to contextualize different norms. Most importantly it fosters an open discussion within judicial decisions about moral considerations and value preferences – a discussion that hopefully takes part in shaping an international substantive constitution in a more humanistic manner.

A rejoinder to this post by Sué González Hauck can be found here.

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ISSN 2510-2567

Tags: *Fragmentation*, *Human Rights*, *International Courts*, *Investor-State Arbitration*, *Proportionality*, *Rules of interpretation*, WTO

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